IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-724

REUBEN GOLDSTEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, REUBEN GOLDSTEIN, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 1, 1977. A petition for rehearing and a suggestion for rehearing en banc was denied on October 14, 1977.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit, not yet reported, appear in Appendix "A" attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict is present between the Circuit Courts of Appeal as to the interpretation of Title 18 U.S.C.A. §2518(1)(c).

2. Whether the Government's attempt to comply with Title 18 U.S.C.A. §2518(1)(c) was inadequate in that the affidavit submitted for this purpose was conclusory and did not provide sufficient facts from which a detached judge could determine whether alternate, viable investigative procedures existed, and whether such failure to so comply is grounds for suppression of the seized conversations.

3. Whether the Government's attempt to comply with Title 18 U.S.C.A. §2518(8)(d) was inadequate and whether such failure to so comply is grounds for suppression of the seized conversations.

4. Whether the court's order authorizing the interception of wire communications was legally insufficient in that the date of the order's entry was omitted as

mandated by Title 18 U.S.C. §2518(4)(e) and whether such omission is grounds for suppression of the seized conversations.

STATUTES INVOLVED

Title 18 U.S.C.A. §2518(1)(c); Title 18 U.S.C.A. §2518(4)(e); and Title 18 U.S.C.A. §2518(8)(d). Procedure for interception of wire or oral communications.

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication *shall* be made in writing upon oath or affirmation to a judge of competent jurisdiction and *shall* state the applicant's authority to make such application. Each application *shall* include the following information:
>
> * * *
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.
>
> * * *
>
> (4) Each order authorizing or approving the interception of any wire or oral communication *shall* specify –
>
> * * *
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."
>
> * * *

(8) (d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of –

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted. (Emphasis Supplied)

* * *

STATEMENT OF THE CASE

Petitioner GOLDSTEIN and five co-defendants were indicted for alleged violations of 18 U.S.C. §1084, 18 U.S.C. §1952 and 18 U.S.C. §1955 in the United States District Court for the Northern District of Texas in November of 1974. Pretrial motions were filed by the defendants including motions to suppress evidence derived from electronic interceptions under color of 18 U.S.C. 2516(1)(c). The District Court denied the motions to suppress on all grounds and the case was set for trial on June 24, 1975.

Prior to the commencement of the trial, all defendants executed and filed waivers of trial by jury. Additionally, all defendants executed certain stipulations concerning the testimony which the Government would have produced and the entire case was submitted to the District Court.

The Petitioner, GOLDSTEIN, stipulated to the facts relative to Count 5 of the indictment and the Government dismissed all other counts against the Petitioner.

On June 30, 1975, the District Court filed its findings as to Petitioner, and found Petitioner guilty of Count 5 of the indictment which charged a violation of 18 U.S.C. §1084. Following the convictions and sentencing, this Petitioner, along with his co-defendants, appealed the judgments to the United States Court of Appeals for the Fifth Circuit and that Court affirmed.

The Petitioner contends that the Government attempted to fulfill the requirement of 18 U.S.C. §2518(1)(c) through an affidavit submitted by Special Agent ROBERT M. BRYANT of the Federal Bureau of Investigation. The Petitioner herein submits that the language contained in the affidavit referred to above is simply bald conclusions, and not facts from which the Attorney General or the authorizing judge could have properly determined whether normal investigative procedure were viable alternatives to electronic surveillance. Petitioner submits that a review of the affidavit of Agent BRYANT in this case indicates that the Government did not need to resort to wiretapping, and was lacking in its showing that other investigative techniques "reasonably appear to be unlikely to succeed if tried". It is submitted that, in this case, a search of

certain premises would have resulted in sufficient information being seized to enable the Government to prove the violations alleged in the indictment. The Government knew the locations of several key "offices" of the business, and had telephone toll records indicating contacts with other locations where book-making activities occurred. Sufficient probable cause existed to obtain search warrants. The affidavit did not contain any facts from which it could be said that the execution of search warrants would not result in the obtaining of evidence against members of the alleged business, other than a bald conclusion of the affiant that such *normally* does not occur. Agent BRYANT stated that during such searches, records are *sometimes* destroyed. The seizure of these records would have proven the existence of the business, would have shown the monetary amount handled by the business, and would have resulted in the identification of the individuals in the offices taking the telephone calls and keeping the records. This evidence, taken together with the other evidence listed in the affidavit (excluding the informants' information), would have provided evidence probative of the violations alleged in the indictment.

All of the above discussion excluded any mention of testimony from the informants. Agent BRYANT stated, as a bald conclusion, that these informants had stated that they would be unwilling to testify. Petitioner GOLDSTEIN contended, as a similar bald conclusion, that every affidavit for wire interception involving gambling offenses states the same conclusion. Further, it is submitted that based on the policy of the Federal Bureau of Investigation not to divulge the identity of an informant, this statement is probable included

without the affiant ever having checked with the informant as to whether or not he would testify. Further, nowhere in the affidavit or in the proceedings below was there any mention of questioning the informants after having granted them immunity.

Petitioner contended that all of the above indicates that the attempt by Agent BRYANT to comply with 18 U.S.C. §2518(1)(c) falls substantially short of the statutory requirement of a full and complete statement as to why other investigatory procedures appear to be unlikely to succeed. The application simply presented bald conclusions similar in style and content to numerous previous wiretap applications. In this case, it is submitted that the evidence contained in the affidavit, combined with the evidence which would have been seized pursuant to search warrants, would have been sufficient to prove this case without a wiretap. The affidavit indicated in broad "boiler-plate" terms the opposite result. Further, with the tool of immunity being available to the Government, it is submitted that at least a verifiable effort be made to ascertain whether the granting of such to the informants would have accomplished the end sought by the Government rather than resorting to the use of wiretapping.

Petitioner further contended before the Fifth Circuit Court of Appeals that the District Court erred in denying Petitioner GOLDSTEIN'S motion to suppress evidence based on non-compliance with Title 18 U.S.C. §2518(8)(d). In compliance with 18 U.S.C. §2518(8)(d), the Government sought and obtained authority to notify by way of inventory five individuals who had been intercepted and identified during the electronic surveillance. Petitioner GOLDSTEIN was not

one of those five persons. Three of said persons, like GOLDSTEIN were not named in the Order authorizing electronic surveillance.

During the evidentiary hearing on the defendants' motion to suppress, Assistant United States Attorney JAQUET testified that GOLDSTEIN was identified in April or possibly May of 1974 and that said information was conveyed to Mr. JAQUET by Agent BRYANT. In spite of this information known to Mr. JAQUET in April or possibly May of 1974, Judge TAYLOR was never informed that additional persons had been intercepted and identified and GOLDSTEIN never received an inventory notice as contemplated by 18 U.S.C. §2518(8)(d).

Petitioner further contended before the Fifth Circuit Court of Appeals that the District Court erred in denying the defendants' motion to suppress evidence based on non-compliance with Title 18 U.S.C. §2518(4)(e) in that the Order authorizing electronic surveillance in the instant matter was signed by the Honorable W.M. TAYLOR but was not dated by Judge TAYLOR. The Order was stamped by the Court Clerk "Received Nov. 20, 1973."

During the evidentiary hearings on the defendants' motion to suppress there were introduced certain documents which reflected that Judge TAYLOR'S Order was entered November 19, 1973, rather than November 20, 1973.

REASONS FOR GRANTING THE WRIT

I.

A CONFLICT EXISTS WITHIN THE CIRCUITS AS TO THE INTERPRETATION OF WHAT IS REQUIRED PURSUANT TO THE DICTATES OF 18 U.S.C. 2518(1)(c).

The Fifth Circuit in the instant case reaches a conclusion which is in conflict with the Ninth Circuit's decision in *United States v. Kalustian*, 529 F.2d 585 (9th Cir., 1975), a copy of which is set forth in Appendix "B" attached hereto.

II.

THE GOVERNMENT FAILED TO COMPLY WITH THE PROVISIONS CONTAINED IN TITLE 18 U.S.C.A. 2518(1)(c) SINCE THE AFFIDAVIT SUBMITTED WAS BASED ON CONCLUSORY ALLEGATIONS AND DID NOT PROVIDE SUFFICIENT FACTS FROM WHICH A DETACHED JUDGE COULD DETERMINE WHETHER ALTERNATE, VIABLE INVESTIGATIVE PROCEDURES EXISTED: SUCH FAILURE REQUIRES SUPPRESSION OF THE SEIZED CONVERSATIONS.

In support of this argument, the Petitioner, REUBEN GOLDSTEIN, relies upon *United States v. Kalustian*, 529 F.2d 585 (9th Cir., 1975), in which the Ninth Circuit Court of Appeals held that affidavits that rely on conclusory allegations and boiler-plate language to

show the unavailability of other investigative techniques are insufficient to meet the standard set forth in Title 18 U.S.C.A. 2518(1)(c) which provides that applications for wire interceptions include:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

After a comparison of the assertions in this affidavit with those of *Kalustian*, it is submitted that the statements herein are no more adequate in satisfying Section 2518(1)(c) than those in the *Kalustian* case. Nowhere in the present application does the Government adequately show why other investigatory techniques are not adequate for this particular case. The mere conclusions of the affiant, based upon his experience and the experience of others, and the fact that in the past searches do not *normally* result in adequate evidence, are insufficient and do not "provide facts from which a judge or magistrate could determine whether other alternative investigative procedures exist as a viable alternative", *United States v. Kalustian, supra.*

Senate Report 1097, 90th Congress, Second Session 101, U.S. Code and Administrative News, 1968, pages 2112, 2190 (1968) contains a statement that "normal investigative procedure would include for example, . . . general questioning or interrogation *under an immunity grant* . . .". (Emphasis Supplied). Apparently, in this case, such a procedure was entirely overlooked. Agent BRYANT stated, as a bald conclusion, that these informants had stated that they would be unwilling to

testify. Again, Petitioner submits, as a similar bald conclusion, that every affidavit for wire interception involving gambling offenses states the same conclusion; the application simply presented bald conclusions similar in style and content to numerous previous wiretap applications.

Wiretapping must only be authorized if the precise requirements of Title III are conformed to by the Government; "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices", *Berger v. United States*, 388 U.S. 41, 63 (1971). This Court's review of the wiretap authorization must insure compliance with the statute, and must insure that the issuing judge performed his duties properly and did not "serve merely as a rubber stamp for the police", *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

Notwithstanding the deficiency of the affidavit in the instant case under the *Kalustian* standard, the Court Below indicated that the Fifth Circuit's opinions preclude a reading of the affidavit in the same fashion as would the Ninth Circuit.

III.

THE GOVERNMENT'S ATTEMPT TO COMPLY WITH TITLE 18 U.S.C.A. §2518(8)(d) WAS INADEQUATE AND SUCH FAILURE TO SO COMPLY IS GROUNDS FOR SUPPRESSION OF THE SEIZED CONVERSATIONS.

Petitioner GOLDSTEIN respectfully submits that his intercepted conversations should be suppressed by this

Honorable Court due to the Government's failure to notify Judge TAYLOR of GOLDSTEIN'S interception and identification. *United States v. Chun*, 503 F.2d 533 (9th Cir., 1974); 386 F. Supp. 91 (U.S.D.C., 1974). Even though GOLDSTEIN was not named in the authorization order, he was entitled to a judicial determination as to whether the interests of justice required that he be served with an inventory notice.

IV.

THE COURT'S ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS WAS LEGALLY INSUFFICIENT IN THAT THE DATE OF THE ORDER'S ENTRY WAS OMITTED AS MANDATED BY TITLE 18 U.S.C. §2518(4)(e) AND SUCH OMISSION IS GROUNDS FOR SUPPRESSION OF THE SEIZED CONVERSATIONS.

In support of this argument, the Petitioner, REUBEN GOLDSTEIN, relies upon *United States v. Lamonge*, 458 F.2d 197 (6th Cir., 1972), *cert. denied*, 409 U.S. 863, 93 S.Ct. 153, 34 L.Ed.2d 110 (1972). *Lamonge* held that the absence of a date on a wiretap order makes the duration of the order unlimited, thereby invalidating the order. The addition of a date *nunc pro tunc* did not save the order–it was facially invalid and the evidence obtained under it should have been suppressed. The Fifth Circuit Court of Appeals herein "declines to follow the Sixth Circuit's path."

Title 18 U.S.C. §2518(4) clearly sets forth the mandatory specifications which must be contained in

any interception order. By the omission of the date it was issued, the Order in the instant case fails to meet the mandatory requirements of Title 18 U.S.C. §2518(4)(e). As a further result of the failure of the Order to include the date it was entered, the period of time during which the interception was authorized became vague and ambiguous and thus, the Order on its face did not meet the specificity requirements of *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967) and *Osborn v. United States*, 385 U.S. 323 (1966).

In the instant case, the fact that the Order was stamped by the District Court Clerk "Received November 20, 1973" and that the Assistant United States Attorney testified that it was signed by Judge TAYLOR on November 20, 1973, should not be decisive.

CONCLUSION

Because of the inconsistency in the standards set forth by these decisions, and since these issues are the few issues which remain extant in the challenge to affidavits and applications in wiretap situations, it is respectfully requested that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner:
REUBEN GOLDSTEIN

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was, on this 11 day of November, 1977, mailed, postage prepaid, to the Honorable WADE H. McCREE, JR., Solicitor General, United States Department of Justice, Washington, D.C. 20530.

CLB PUBLISHERS

By 

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Anthony Paul DIADONE, John Eli Stone, Richard Carl Biggs, Reuben Goldstein, and John Denton Ritter,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

James William "Puny" WINNINGHAM,
Defendant-Appellant.

Nos. 75-2991, 75-3222.

United States Court of Appeals,
Fifth Circuit.

Sept. 1, 1977.

In prosecutions before the United States District Court for the Northern District of Texas, Sarah T. Hughes, J., all defendants but one were convicted of using wire communications in interstate commerce to engage in business of betting or wagering; two defendants were convicted of conducting an illegal gambling business; all defendants' appeals in the two

cases were consolidated. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) failure to date wiretap order at time it was signed by judge was a clerical mistake that could be corrected under Rule 36; (2) 13-page affidavit for wiretap concerning claimed gambling violations, when considered with the facts averred, satisfied the relevant standards for a "full and complete statement"; (3) acting Attorney General could delegate power to assistant attorney general to authorize wiretap application; (4) interruption of irrelevant conversations could not render all of intercepted conversations inadmissible; (5) fact that tape recordings of intercepted telephone conversations were not taken to judge until about two weeks after wiretap order expired did not require suppression of evidence; (6) defendant who had not been named in wiretap order was not entitled to an inventory notice, and (7) errors in the order to install pen registers were clerical and could not afford basis for motion to suppress.

Affirmed.

1. Telecommunications 496

In view of fact that order authorizing telephone interception was dated when it was received by district court clerk on same day that it was signed by judge, failure to date order at time it was signed by judge was a clerical mistake that could be corrected under Rule 36. Fed.Rules Crim.Proc. rule 36, 18 U.S.C.A.

2. Telecommunications 496

Purpose of "full and complete statement" requirement for application for a wiretap or interception order

is to inform issuing judge of difficulties involved in use of conventional techniques, rather than to establish that every other imaginable mode of investigation would be unsuccessful; the test for sufficiency of the statement of facts directs court to take a commonsense view of the statement. 18 U.S.C.A. §2518(1)(c).

3. Telecommunications 496

Thirteen page affidavit for wiretap concerning claimed gambling violations, when considered with the facts averred, satisfied the relevant standards for a "full and complete statement" required by statute. 18 U.S.C.A. §2518(1)(c).

4. Telecommunications 496

Acting Attorney General stood in shoes of Attorney General and possessed powers of Attorney General and thus could delegate power to assistant attorney general to authorize wiretap application. 18 U.S.C.A. §2516(1).

5. Criminal Law 394.3

Under circumstances, including fact that most of unauthorized telephone interceptions had occurred while voice identification was being made, the interruption of irrelevant conversations could not render all of the intercepted conversations inadmissible.

6. Criminal Law 394.3

Fact that tape recordings of intercepted telephone conversations were not taken to judge until about two

weeks after wiretap order expired did not require suppression of evidence, absent showing that defendants had been prejudiced by the delay or that the integrity of the interceptions had been in any way disturbed. 18 U.S.C.A. §2518(8)(a).

7. Telecommunications 496

Defendant who had not been named in wiretap order was not entitled to an inventory notice informing him of the existence and dates of the interception. 18 U.S.C.A. §2518(8)(d).

8. Telecommunications 496

If Government has probable cause to believe that an individual is engaged in criminal activity under investigation and expects to intercept that individual's conversations over the tapped telephones, his name must be included in the application to intercept.

9. Criminal Law 394.3

Even if application for wiretap should have contained name of defendant who, although a known gambler, Government contended was not known to be involved in the gambling operation under investigation and that his voice was not identified until date of termination of authorized interception period, failure of application to contain defendant's name did not compel suppression of the interceptions.

10. Criminal Law 394.3

Where application for wiretap, the order authorizing interception and agent's affidavit all contained the correct telephone number, errors in the order to install pen registers were clerical and could not afford basis for motion to suppress.

11. Constitutional Law 82
Searches and Seizures 7(1)
Telecommunications 492

Statutes which permit wiretapping and electronic surveillance under order do not contravene the First, Fourth, Fifth, or Sixth Amendments to Constitution. 18 U.S.C.A. §§1955, 2510-2520; U.S.C.A.Const. Amends. 1, 4, 5, 6.

12. Gaming 98(1)

District court's finding that defendants were involved in an illegal gambling business in which five or more persons shared responsibilities were sufficient for purposes of statute requiring a minimum of five in gambling enterprise. 18 U.S.C.A. §§1955, 2510-2520.

13. Indictment and Information 144.1(1)

Indictment for conducting an illegal gambling business was not required to be dismissed on asserted ground that it alleged that defendants "owned" all or part of the gambling business, whereas Government stated in its response to motion for bill of particulars that owners were unknown, since by including the

words "and owners" in the indictment, the Government was merely stating another way that defendant could be in violation and it was not incumbent upon Government to prove that they were the "owners." 18 U.S.C.A. §1955.

14. Stipulations 14(10)

Stipulation of evidence that defendant relayed line, or odds, information to codefendant, and that defendant and codefendant instructed one another to place bets on certain games indicated that defendant was not merely a bettor, but was actually a participant in the operation. 18 U.S.C.A. §1955.

Appeals from the United States District Court for the Northern District of Texas.

Before TUTTLE, THORNBERRY, and TJOFLAT, Circuit Judges.

THORNBERRY, Circuit Judge:

Appellants, defendants below, stand convicted of (1) conducting an illegal gambling business in violation of 18 U.S.C. §1955, and (2) using wire communications in interstate commerce to engage in the business of betting or wagering in violation of 18 U.S.C. §1084.[1] Much of the evidence was stipulated, and most of it emerged through wiretaps placed on defendant Stone's telephone and on two public pay telephones in defendant

[1] Not all of the defendants were convicted of both of these crimes All defendants except Biggs were convicted of violating §1084. Defendants Stone and Biggs were also convicted of violating §1955.

Stone's restaurant. The government claimed authority for the tap under an order issued by Judge Taylor of the Northern District of Texas. The defendants moved to suppress the evidence intercepted through these taps, as well as all evidence obtained by reason of the interceptions. The trial court denied the motion, and the case proceeded to trial and conviction.

Defendants raise a total of twelve issues on appeal. Most of these issues concern the admissibility of the evidence intercepted through the wiretaps. Some defendants raise additional claims unconnected to the wiretap order. The defendants' arguments on these issues do not merit reversal of the convictions. We affirm the district court as to all defendants.

I.

All of the defendants contend that the trial court erred in refusing to suppress the contents of intercepted oral communications because the order authorizing interception was not dated at the time it was signed by the district court. In essence, defendants urge that since the order authorizing the wiretapping was not dated when it was signed, the interception was authorized for a period of time unlimited by the order. This is impermissible under 18 U.S.C. §2518(4)(e), and *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). After a hearing where Harold Jaquet, former Assistant United States Attorney in charge of investigation in this case, and FBI Special Agent Bryant testified that Judge Taylor signed the order authorizing the interception of wire communications on November

20, 1973, the order was amended *nunc pro tunc* pursuant to F.R.Crim.P. 36. Rule 36 allows the correction of "clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission."

Defendants rely primarily upon a Sixth Circuit case, *United States v. Lamonge*, 458 F.2d 197 (6 Cir. 1972), *cert. denied*, 409 U.S. 863, 93 S.Ct. 153, 34 L.Ed.2d 110 (1972). *Lamonge* held that the absence of a date on a wiretap order makes the duration of the order unlimited, thereby invalidating the order. The addition of a date *nunc pro tunc* did not save the order–it was facially invalid and the evidence obtained under it should have been suppressed.

The instant case differs from *Lamonge* in at least one important respect. The order in *Lamonge* had no date stamped on it, while the order in this case was received by the district court clerk shortly after it was signed by Judge Taylor, and was stamp-dated by the clerk November 20, 1973.

[1] In view of the fact that the order authorizing interception in this case was dated when it was received by the district court clerk on the same day that it was signed by Judge Taylor, we hold that the failure to date the order at the time it was signed by Judge Taylor was a clerical mistake that could be corrected under Rule 36. To the extent which this result departs from that reached by the Sixth Circuit in *Lamonge*, we decline to follow the Sixth Circuit's path.

II.

Defendants Stone, Biggs, and Goldstein contend that the trial court erred in denying the motion to suppress because the order authorizing the interception was based upon an insufficient application and affidavit. The controlling statute, 18 U.S.C. §2518(1)(c), requires every application for a wiretap or interception order to contain, *inter alia*, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." The claimed defect in this case is that the affidavit did not contain such a full and complete statement.

[2] The purpose of the "full and complete statement" requirement, as expressed by cases decided by our Circuit, is to inform the issuing judge of the difficulties involved in the use of the conventional techniques, rather than to establish that every other imaginable mode of investigation would be unsuccessful. *United States v. Pacheco*, 489 F.2d 554 (5 Cir. 1974), *cert. denied*, 421 U.S. 909, 95 S.Ct. 1558, 43 L.Ed.2d 774 (1975). The test for sufficiency of the statement of facts directs the court to take a common sense view of the statement. *United States v. Robertson*, 504 F.2d 289 (5 Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1568, 43 L.Ed.2d 778 (1975).

[3] Agent Bryant's thirteen page affidavit supporting the application sets forth the details of the gambling operation as related to various agents by six confidential informants. The affidavit asserted that conventional surveillance techniques had proven and were likely to be ineffective because most of the gambling

activity transpired over the telephone. A search of defendants' residences would likely be ineffective, asserts affiant, because gambling operations frequently maintain only temporary records which often are in cypher. Furthermore, during raids to seize such records, gambling operators frequently destroy what records they have. Finally, affiant asserts that the government's informers will not testify at trial because of fear for their safety.

We have held a similar statement of facts sufficient to justify the grant of an interception order. *See United States v. McCoy*, 539 F.2d 1050 (5 Cir. 1976) (*McCoy II*). In *McCoy II*, we stated:

> [T]he possibility that wiretaps may almost always be approved in similar bookmaking cases does not make "formalities" of §§2518(1)(c) and (3)(c). The application must still contain the "full and complete statement". The decision whether to order a wiretap is then to be made by the district court exercising its discretion. *See United States v. Smith*, [9 Cir.] 519 F.2d [516] at 518. That court, in an effort to make the §2518(3)(c) finding, "may require the applicant to furnish additional testimony or documentary evidence in support of the application". 18 U.S.C. §2518(2). In the absence of additional evidence a wiretap order might well be denied. We do not, therefore, judicially abrogate §§2518(1)(c) and (3)(c) with respect to §1955 investigations. We simply hold that the district court's discretion was exercised here upon sufficient factual representations.

539 F.2d at 1056.

The instant statement, when considered with the facts averred, likewise satisfies the relevant standards.

III.

[4] Defendants Stone and Biggs argue that the trial court erred in refusing to suppress the intercepted communications because the application to Judge Taylor did not have proper authorization. 18 U.S.C. § 2516(1) permits application for an interception order only upon the authorization of the Attorney General or an Assistant Attorney General specially designated by the Attorney General. The authorization in this case was executed by Assistant Attorney General Henry Petersen. He issued the authorization under power delegated to him by *Acting* Attorney General Robert H. Bork. Bork, goes the defendants' argument, was not an Attorney General and therefore could not authorize the application and could not delegate the power to do so.

We have previously held that in such matters Acting Attorney General Bork stood in the shoes of the Attorney General and possessed the powers of the Attorney General. *See United States v. McCoy*, 539 F.2d 1050, 1054 (5 Cir. 1976) (*McCoy II*); *United States v. McCoy*, 515 F.2d 962, 963 (5 Cir. 1975), *cert. denied*, 423 U.S. 1059, 96 S.Ct. 795, 46 L.Ed.2d 649 (1976) (*McCoy I*). *See also United States v. Pellicci*, 504 F.2d 1106, 1107 (1 Cir. 1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 821 (1975): "There is no basis for concluding that one 'acting' as Attorney General has fewer than all the powers of that office." This asserted deficiency in the authorization does not doom the interception order.

IV.

[5] Defendants Stone, Biggs, Winningham, and Goldstein contend that the interception of wire communications was not made in conformity with the order of authorization signed by Judge Taylor. As to the pay telephones in the restaurant, the order restricted monitoring to those times when Stone was in the restaurant and permitted interception of only those calls to which Stone was a party. Defendants argue that the wiretap evidence in question should have been suppressed because of approximately 92 violations of these aspects of Judge Taylor's order, and because Judge Taylor was not told of all the unauthorized interceptions during the court of the wiretaps.

In *United States v. Doolittle*, 507 F.2d 1368 (5 Cir. 1975), *en banc*, 518 F.2d 500 (5 Cir. 1975), *cert. dismissed as to petitioner Baxter*, 423 U.S. 1008, 96 S.Ct. 439, 46 L.Ed.2d 380 (1975), *cert. denied sub nom. Anderson v. United States*, ____ U.S. ____, 97 S.Ct. 1172, 51 L.Ed.2d 580 (1977), *sub nom. Malloway v. United States*, ____ U.S. ____, 97 S.Ct. 1173, 51 L.Ed.2d 580 (1977), *sub nom. Doolittle v. United States*, *id.*, this court also confronted an attack upon the scope of the interceptions authorized by court order. "There is no question that some irrelevant and personal portions of gambling conversations were intercepted or that certain nonpertinent conversations were intercepted. But this is inherent in the type of interception authorized by Title III, and we do not view the simple inclusion of such conversations, without more, as vitiating an otherwise valid wiretap." 507 F.2d at 1372. So long as the monitoring agent listened to

each call only long enough to determine whether it dealt with the subject matter of the district court's order, the interception of irrelevant conversations would not render all of the intercepted conversations inadmissible. *See United States v. Armocida*, 515 F.2d 29 (3 Cir.), *cert. denied*, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975).

In the hearing on defendants' motion to suppress, Mr. Jaquet, the Assistant United States Attorney in charge of the interception, testified that as to the taps on the pay telephones: (1) sometimes, there was difficulty in determining whether Stone was in the restaurant and, in fact, Stone left the premises on several occasions without being observed; (2) the monitored telephones were located in places not well suited for surveillance; (3) monitoring agents encountered unexpected difficulty in identifying Stone's voice; and (4) the complications experienced by the agents were communicated to Judge Taylor in written and oral reports submitted at the end of each five-day segment of the period of interception, as per the interception order.

In view of the foregoing factors related by Mr. Jaquet and the fact that most of the unauthorized interceptions occurred while voice identification was being made, the district court acted properly in denying defendants' motion to suppress on this ground.

V.

[6] Defendants Stone and Biggs contend that the district court erred in refusing to grant their motion to

suppress because the tape recordings of intercepted conversations were not taken to Judge Taylor immediately upon the expiration of the authorized interception period. The government bears a duty to surrender the tapes to the court immediately upon completion of the interception period. 18 U.S.C. §2518(8)(a). The tapes were not taken to Judge Taylor until about two weeks after the order expired.

The government relies upon *United States v. Sklaroff*, 506 F.2d 837, 840 (5 Cir. 1975), *cert. denied*, 423 U.S. 874, 96 S.Ct. 142, 46 L.Ed.2d 105 (1975) (*Sklaroff I*), where this court held that a fourteen day delay did not amount to a violation of §2518(8)(a) where there was no showing of prejudice to the defendants and the government accounted for the delay. The defendants have not shown that they were prejudiced by the delay or that the integrity of the interceptions was in any way disturbed. There was no error in refusing to suppress the evidence on this basis.

VI.

[7] Defendant Goldstein argues that the government failed to serve him with a notice of inventory as required by §2518(8)(d).

The interception period was in November and December of 1973. According to the government, Goldstein's voice was identified in April or May of 1974; Goldstein's attorney was told during August of 1974 that Goldstein had been overheard, and Goldstein was compelled to appear before the grand jury in Dallas during that same month. An additional inventory notice

was mailed to Goldstein on April 7, 1975. The hearing on defendants' motion to suppress did not occur until June 6, 1975.

Section 2518(8)(d) provides that within ninety days after the termination of the authorized interception period, the issuing judge "shall cause to be served, on the persons named in the order . . . , and such other parties to intercepted communications as the judge may determine in his discretion that it is in the interest of justice" an inventory notice, informing these persons of the existence and dates of the interception. The statute does not require that inventory notice be sent to persons not named in the order. The judge acts in his discretion. *United States v. Donovan*, 429 U.S. 413, 97 S.Ct. 658, 669, 50 L.Ed.2d 652 (1976).

Since Goldstein was not named in the order,[2] the judge was not required to send him inventory notice under §2518(8)(d). Still, Goldstein actually received the equivalent of inventory notice ten months before the hearing on the motion to suppress. The district court committed no error when it denied this claim in the motion to suppress.

VII.

Defendant Ritter contends that the wiretap evidence should have been suppressed as to him because he was known to be involved in the gambling transactions in

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[2]We do not understand Goldstein to argue that his name should have been included in the application and order.

question, but was not named in the application for the wiretaps.

[8] If the government has probable cause to believe that an individual is engaged in the criminal activity under investigation and expects to intercept that individual's conversations over the tapped telephones, his name must be included in the application to intercept. *United States v. Donovan*, 429 U.S. at 427-428, 97 S.Ct. at 668, 50 L.Ed.2d at 667-668.

Although Ritter was a known gambler, the government contends that he was not known to be involved in the gambling operation being investigated, and that his voice was not identified until December 4, 1973 (the date of the termination of the authorized interception period). After it was discovered that Ritter was involved, a notice of inventory was sent to him on February 11, 1974.

[9] Even if the application should have contained Ritter's name, the failure to do so does not compel suppression of the interceptions. *United States v. Donovan*, 429 U.S. at 435-437, 97 S.Ct. at 672-73, 50 L.Ed.2d at 672-673; *United States v. Alfonso*, 552 F.2d 605 (5 Cir. 1977); *United States v. Sklaroff*, 552 F.2d 1156 (5 Cir. 1977) (*Sklaroff II*).

VIII.

Defendant Ritter also argues that the order authorizing the installation of pen register devices was defective because it contained errors in the digits of the telephone listed.

One of the numbers listed in the pen register order is 358-0996. The order authorizes installation of pen

registers on certain numbers, including 384-0996. Agent Bryant's affidavit correctly identifies the number as 368-0996.

The government states that the variance is immaterial, citing *United States v. Doolittle, supra,* and *United States v. Sklaroff, supra (Sklaroff I).* In *Sklaroff I,* the court found that an error in one digit in one telephone number, and the transposition of two digits in an exchange number (691, stated as 961), were clerical errors and presented no ground for suppression. 506 F.2d at 840. Similarly, the court in *Doolittle* held that one incorrect digit in one of four telephone numbers was an immaterial variation from the actual number which did not warrant reversal of the district court's decision. 507 F.2d at 1371.

[10] The application for interception, the order authorizing interception, and Bryant's affidavit all contained the correct number, 368-0996. Therefore, we hold that the errors in the order to install pen registers were clerical. The district court properly denied Ritter's motion to suppress.

IX.

[11] Defendant Goldstein argues that the provisions of 18 U.S.C. §§2510-2520, which permit wiretapping and electronic surveillance, contravene the First, Fourth, Fifth, and Sixth Amendments to the Constitution.

This argument has no merit. We have twice held that the challenged statutes do not contravene these constitutional safeguards. *United States v. Sklaroff*

(Sklaroff I), 506 F.2d at 840; *United States v. Doolittle*, 507 F.2d at 1370.

X.

Defendants Stone and Biggs contend that the trial court did not find five or more persons who conducted, financed, managed, supervised, directed, or owned all or part of the alleged illegal gambling business, as required for a violation of 18 U.S.C. §1955.

According to *United States v. Bridges*, 493 F.2d 918, 921 (5 Cir. 1974), "almost anyone who works in the gambling enterprise counts towards making up the minimum five...." *See also United States v. Ciamacco*, 362 F. Supp. 107, 111 (W.D.Pa.1973): "It is well established that all participants in the operation of an illegal gambling business, except customers placing bets, are conducting that business for purposes of §1955...."

[12] On page 405 of the Record, the district court stated in the "Findings by the Court on Stipulations of Evidence" that Stone was involved in an illegal gambling business in which five or more persons shared responsibilities. A similar finding with regard to Biggs is found on page 408 of the Record. There is no challenge to the evidentiary support for these findings. The district court's findings satisfy §1955.

XI.

Stone and Biggs further contend that Count One of the indictment should have been dismissed because it alleged that these defendants "owned" all or part of the gambling business, whereas the government stated in its response to defendants' Motion for a Bill of Particulars that the owners of the alleged illegal gambling business were unknown.

[13] This argument has no merit. Although the government's response to item 18(d) of the Motion for a Bill of Particulars states that the names and addresses of all owners were unknown, it continues to say that the names and addresses of the owners probably include the names listed in 18B as participants. Stone and Biggs were listed in 18B. By including the words "and owners" in the indictment the government was merely stating another way that Stone and Biggs could be in violation of §1955, and that it was not incumbent upon the government to prove that they were the "owners." It was only necessary that Stone and Biggs participated in the gambling operations in one of the ways listed in the indictment.

XII.

The final argument raised by defendants Stone and Biggs is that there is insufficient evidence to support their convictions. Defendant Biggs contends that the evidence reflects that he was a bettor and not a bookmaker. Both Stone and Biggs assert that the evidence in the record is insufficient to support their

convictions because certain stipulations of evidence were never formally admitted into evidence.

[14] Stipulation of Evidence Number 1 states that Biggs relayed line (or odds) information to Stone, and that Biggs and Stone instructed one another to place bets on certain games. This evidence indicates that Biggs was not merely a bettor, but was actually a participant in the operation. *See United States v. Milton*, 555 F.2d 1198 (5 Cir., 1977).

Likewise, the record reflects that the stipulations in question were admitted into evidence. R. Vol. VII at 33-37. There is no error here.

Accordingly, the judgment of the district court is, in all respects,

AFFIRMED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

October 14, 1977

TO ALL PARTIES LISTED BELOW:

NO. 77-2991 & 75-3222 – U.S.A. v. DAIDONE, ET AL., U.S.A. v. WINNINGHAM

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

**on behalf of all appellants,

cc: Mr. L.N. Westerlace
Messrs. Lester L. May
Kenneth Herridge
Messrs. Douglas G. Crosby
Stephen Stein
Messrs. Cecil Emerson
Robert T. Baskett
Ms. Judith A. Shepherd
Messrs. Charles D. Cabaniss
Robert C. Prather
Mr. Warren Burnett
Richard J. Clarkson

APPENDIX B

UNITED STATES of America,
Appellee,

v.

Kale KALUSTIAN, Appellant.

UNITED STATES of America,
Appellee,

v.

Patrick Dale POND, Appellant.

UNITED STATES of America,
Appellee,

v.

Stanley Norman GRAY, Appellant.

UNITED STATES of America,
Appellee,

v.

David SELDITCH, Appellant.

UNITED STATES of America,
Appellee,

v.

Otto Vincent MARINO, Appellant.

UNITED STATES of America,
Appellee,

v.

Leopold OBEZO, Appellant.

UNITED STATES of America,
Appellee,

v.

Mable Linda CUCCIA, Appellant.

No. 74-3314, 74-3315, 74-3305,
74-3264 and 74-3265.

United States Court of Appeals,
Ninth Circuit.

Aug. 4, 1975.

As Amended Dec. 11, 1975.

Rehearing and Rehearing En Banc
Denied March 25, 1976.

Defendants were convicted in the United States District Court for the Central District of California, Manuel L. Real, J., of illegal gambling activities, and they appealed. The Court of Appeals, Skopil, District Judge, held that affidavit in support of application for wiretap order was insufficient where it contained mere conclusions and failed to set forth facts adequately showing why traditional investigating techniques of alleged gambling activities by certain named individuals were not sufficient, the Court also held that in order to obtain a wiretap order the Government must inform reviewing judge of every technique which was customarily used in police work in investigating the type of crime involved, and explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of particular circumstances of the case, and an individual's right to privacy which authorization statute seeks to preserve demands no less; it was further held that evidence gathered through invalidly issued wiretap order and its extensions was not admissible.

Reversed and remanded.

1. Telecommunications 496

Procedural steps provided in the Omnibus Crime Control and Safe Streets Act pertaining to electronic surveillance require strict adherence. 18 U.S.C.A. §2510 et seq.

2. Telecommunications 496

The Omnibus Crime Control and Safe Streets Act of 1968 was written to create limited authority for electronic surveillance in investigation of specified crimes thought to lie within the province or organized criminal activities. 18 U.S.C.A. §2510 et seq.

3. Telecommunications 496

Judicial review of wiretap authorization is limited and affidavit in support thereof should not be interpreted in a hypertechnical manner but should be interpreted in a commonsense manner.

4. Telecommunications 496

Within prescribed limits, a close scrutiny must be exercised to determine whether wiretap orders conformed to act authorizing such orders and the review must insure that issuing magistrate properly performed his function and did not serve merely as a rubber stamp for the police. 18 U.S.C.A. §2510 et seq.

5. Telecommunications 496

Affidavit in support of application for wiretap order was insufficient where it contained mere conclusions and failed to set forth facts adequately showing why traditional investigating techniques of alleged gambling activities by certain named individuals were not sufficient. 18 U.S.C.A. §2518(1)(c).

6. Telecommunications 496

In order to obtain a wiretap order the Government must inform reviewing judge of every technique which was customarily used in police work in investigating the type of crime involved, and explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of particular circumstances of the case, and an individual's right to privacy which authorization statute seeks to preserve demands no rest. 18 U.S.C.A. §2518.

7. Searches and Seizures 3.6(3)
Telecommunications 496

Mere conclusions by an affiant are insufficient to justify a search warrant, or a wiretap order and do not provide a basis upon which a detached judge can determine whether other alternative investigative procedures exist as viable alternatives.

8. Criminal Law 394.3

All evidence gathered through electronic surveillance pursuant to an invalid wiretap order and its extensions was inadmissible. 18 U.S.C.A. §2518.

Arthur Lewis (argued), Los Angeles, Cal., for appellant in No. 74-3314.

James A. Twitty, Sp. Atty. (argued), Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3314.

Edward I. Gritz, Los Angeles, Cal., for appellant in No. 74-3315.

James A. Twitty, Sp. Atty., Los Angeles, Cal., for appellee in No. 74-3315.

David S. Sperber, Los Angeles, Cal., for appellant in No. 74-3305.

William D. Keller, U.S. Atty., Los Angeles, Cal., for appellee in No. 74-3305.

Lee A. Freeman (argued), Los Angeles, Cal., for appellant in No. 74-3264.

Kevin O'Malley (argued), U. S. Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3264.

James Edward Green (argued), Van Nuys, Cal., for appellant in No. 74-3265.

Kevin F. O'Malley (argued), U. S. Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3265.

OPINION

Before ELY and HUFSTEDLER, Circuit Judges, and SKOPIL,* District Judge.

SKOPIL, District Judge:

Appellants seek review of their convictions for illegal gambling activities. 18 U.S.C. §§1955 and 2. They claim their motions for suppression of evidence were improperly denied. They also argue that there was insufficient evidence to sustain the verdicts.

According to the Government, confidential informants "advised" federal agents in 1971 that defendant Kalustian was operating a bookmaking operation from the Topper Club (Club) in Rosemead, California. Defendants Pond and Marino, among others, were identified as agents for the operation. On December 20, 1971, the Department of Justice sought court orders authorizing wire taps on three telephones at the Club, one at defendant Stempke's residence, and one at the residence of Patricia Jackson. The application was authorized by Attorney General John Mitchell and granted on December 20, 1971. 18 U.S.C. §2518(1)(c) provides that such applications shall include

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The Government attempted to fulfill that requirement through affidavits supplied by Special FBI Agent James Brent (Affidavits), which essentially contained the following representations:

> "The informants named herein have all said that they will not testify to information they have provided, even if granted immunity. * * *

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*Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

"Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, are involved in gambling activities over the telephone subscribed to in the name of the Topper Club.***

"Furthermore, such investigative techniques as physical surveillance and the records obtainable on Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigation of gambling activities, normal investigative procedures appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of Federal laws. My experience and the experience of other Agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offense. I have found through my experience and the experience of other Special Agents, who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy the records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish elements of Federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers' activities. Therefore, the interception of these telephone communications is the only available method of investigation which has

a reasonable likelihood of securing the evidence necessary to prove violation of these statutes. * *

"Wherefore, because of the existence of facts and underlying circumstances of the continuing investigation listed above in paragraphs 4 through 32b, I submit that the probable cause as submitted in paragraphs 3a, 3b and 3d exists; that the extensive normal investigative procedures tried, as set forth in paragraphs 4 through 32b, have failed to gather evidence necessary to sustain prosecution for violation of the offenses enumerated in paragraph 3a, and reasonably appear unlikely to succeed; * * *"

Appellants contend that their motions to suppress the wiretap evidence should have been granted because the Government's application did not satisfy 18 U.S.C. §2518(1)(c). They argue that the supporting affidavits contain bald conclusions rather than facts from which the Attorney General and the judge could determine whether "normal investigative procedures" were viable alternatives to electronic surveillance. §2518(3)(c).

[1] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Act), 18 U.S.C. §2510 et seq., absolutely prohibits electronic surveillance by the federal government except under carefully defined circumstances and after securing judicial authority. Procedural steps provided in the Act require strict adherence. *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974). The importance of these procedures reflects the dual purpose of Title III, which is to

"(1) [protect] the privacy of wire and oral communications, and (2) [delineate] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News, pp. 2112, 2153 (hereinafter cited as "History").

[2] Title III was written to create limited authority for electronic surveillance in the investigation of specified crimes thought to lie within the province of organized criminal activity. History, pp. 2153-2163. It was designed to conform to prevailing constitutional standards. *Berger v. New York*, 388 U.S. 41, 87

S. Ct. 1873, 18 L.Ed.2d 1040 (1967); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). The restraint with which such authority was created reflects the legitimate fears with which a free society entertains the use of electronic surveillance. As stated in *Berger, supra*, "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices". 388 U.S. at 63, 87 S. Ct. at 1885.

Section 2518(1)(c) of the Act

> "is patterned after traditional search warrant practices and present English procedure in the issuance of warrants to wiretap by the Home Secretary. [citation omitted] The judgment [of the judge or magistrate] would involve a consideration of all the facts and circumstances. * * * Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. *See Giancana v. United States*, 352 F.2d 921 (7th Cir. 1965), cert. denied, 382 U.S. 959, 86 S. Ct. 437, 15 L.Ed.2d 362; *New York v. Saperstein*, 2 N.Y.2d 210, 159 N.Y. S.2d 160, 140 N.E.2d 252 (1957). What the provision envisions is that the showing be tested in a practical and commonsense fashion. Compare *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965)." History, p. 2190.

[3,4] Our review of the wiretap authorization is limited. We are reminded that

> "[w]here [the underlying circumstances in the affidavit] are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States v. Ventresca, supra* at 109, 85 S. Ct. at 746.

Within our prescribed limits, however, the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III. The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny. *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973); *United States v. Cox*, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934, 92 S. Ct. 1783, 32 L.Ed.2d 136 (1972);

United States v. Cox, 462 F.2d 1293 (8th Cir. 1972). Our view of wiretap orders must ensure that the issuing magistrate properly performed his function and did not "serve merely as a rubber stamp for the police". *Ventresca, supra* at 109, 85 S. Ct. at 746.

The affidavits set forth facts from which probable cause to infer the operation of a gambling conspiracy could be gleaned. Nearly all of these "facts" trickled into the ears of FBI agents through the efforts of a series of professional gamblers and bookmakers. Unfortunately, as the affidavits attest, none of the underworld informants are willing to testify. The refusal of the informants to testify is a matter for the court to consider in authorizing electronic surveillance. However, standing alone, it may not be sufficient. Evidence of the telephone numbers used by the bookmaking operation and the identities of some of the conspirators could not successfully support a prosecution without that testimony.

Consequently by investigating officials decided electronic surveillance was imperative. They discarded alternative means of further investigation because "knowledge and experience" in investigating other gambling cases convinced them that "normal investigative procedures" were unlikely to succeed. Agent Brent recites that searches are often fruitless because gamblers keep no records, destroy them, or maintain them in undecipherable codes. Use of the phone company's records alone is inconclusive.

The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.

> "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of

> wire and oral communications. *These procedures were not to be routinely employed as the initial step in criminal investigation.* Rather, the applicant must state that the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *United States v. Giordano, supra.* (emphasis added).

The Government's position is further undetermined by the activity of other crimefighting organizations. California, among other states, deprives its policemen of electronic surveillance in all cases. This has not prevented them from successfully prosecuting gambling crimes.

Obviously electronic surveillance can facilitate criminal investigation. Because other investigative techniques are usually slower and more difficult, Congress did not require exhaustion of "all possible" investigative techniques before orders for wiretaps could be issued. *U.S. v. Smith*, 519 F.2d 516 (9th Cir., 1975). But Title III does not allow wiretapping to replace such other techniques unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous".

[5,6] The Government failed in this case to satisfy 18 U.S.C. §2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A judge reviewing a wiretap application is handicapped without such a showing. Title III and the individual's right to privacy, which it seeks to preserve, demand no less than a full and complete statement of underlying circumstances.

[7] Mere conclusions by the affiant are insufficient to justify a search warrant, *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964), or a wiretap order. More specifically, they do not provide facts from which a detached judge or magistrate can determine whether other alternative investigative procedures exist as a viable alternative.

[8] The trial court's order denying appellants' motions for suppression of electronic surveillance evidence is reversed, and all consolidated cases are remanded for a new trial. All evidence

gathered through electronic surveillance pursuant to the original §2518 order and its extensions shall not be admitted in subsequent proceedings.

In view of that ruling, the other issues on appeal are not reached.

REVERSED and REMANDED.